

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT  
3

4 August Term 2006

5 (Argued: February 14, 2007 Decided: October 2, 2007)

6 Docket No. 06-2710-cr

7 -----x  
8 UNITED STATES OF AMERICA,

9  
10 Appellee,

11 -- v. --

12  
13 WALINE BRUTUS,

14  
15 Defendant-Appellant.  
16

17 -----x  
18  
19  
20 B e f o r e : Jacobs, Chief Judge, Walker and Calabresi, Circuit  
21 Judges.

22 Appeal from a judgment of the United States District Court  
23 for the Eastern District of New York (I. Leo Glasser, Judge)  
24 convicting appellant, after a jury trial, of importing five or  
25 more kilograms of cocaine, in violation of 21 U.S.C. § 952, and  
26 possessing five or more kilograms of cocaine with the intent to  
27 distribute, in violation of 21 U.S.C. § 841(a).

28 AFFIRMED.

29 DAVID A. LEWIS, Federal Defenders  
30 of New York, Inc., Appeals Bureau,  
31 New York, NY, for  
32 defendant-appellant.

1  
2 ANTHONY G. KYRIAKAKIS, Assistant  
3 United States Attorney (Roslynn R.  
4 Mauskopf, United States Attorney  
5 for the Eastern District of New  
6 York, Susan Corkery, Assistant  
7 United States Attorney, on the  
8 brief), New York, NY, for appellee.  
9

10  
11 JOHN M. WALKER, JR., Circuit Judge:  
12

13 Defendant-appellant Waline Brutus appeals from a judgment of  
14 the District Court for the Eastern District of New York (I. Leo  
15 Glasser, Judge) convicting her, after a jury trial, of importing  
16 five or more kilograms of cocaine, in violation of 21 U.S.C. §  
17 952, and possessing five or more kilograms of cocaine with the  
18 intent to distribute, in violation of 21 U.S.C. § 841(a).  
19 Brutus, who testified on her own behalf at trial, contends on  
20 appeal that the district court erred in instructing the jury on  
21 how to evaluate her testimony. For the reasons that follow, we  
22 agree; however, we further conclude that the error was harmless  
23 beyond a reasonable doubt and therefore affirm Brutus'  
24 convictions.

25 **BACKGROUND**

26 **I. The Government's Case**

27 At trial, the government elicited testimony to the following  
28 effect. On August 27, 2005, Brutus arrived at JFK International  
29 Airport on a flight from Haiti. While waiting in the baggage  
30 area, she was approached by Officer Maria Morelli, a member of

1 the airport's Passenger Enforcement Roving Team. In response to  
2 questioning by Officer Morelli, Brutus confirmed that everything  
3 in her possession, including her suitcase, was her own. After  
4 moving Brutus to a secondary inspection area, Officer Morelli  
5 inspected Brutus' suitcase. There, she found twelve men's  
6 sandals<sup>1</sup> packed between various articles of clothing. Noticing  
7 that the sandals were unusual in weight and size, the officer  
8 probed one of them. Inside it she found a white, powdery  
9 substance that field tested positive for cocaine.

10 After escorting Brutus to a private search room, Officer  
11 Morelli arrested Brutus and contacted agents from Immigration and  
12 Customs Enforcement. Senior Special Agent Amanda Jackson and  
13 Special Agents Sean Garvey and Timothy Varian responded. Agent  
14 Garvey conferred with Officer Morelli and then identified himself  
15 to Brutus and asked her if she spoke English, to which she  
16 replied affirmatively. Brutus was then informed of her Miranda  
17 rights, which she waived.

18 During a fifteen minute initial interview, Brutus admitted  
19 that she knew drugs were hidden within the sandals, though she  
20 was not aware of the kind of drugs. She further explained that  
21 she was recruited to be a drug courier by a friend of hers named  
22 Marjorie; that she was to be paid \$3,000 for her efforts; and  
23 that someone whom she did not know was supposed to meet her in  

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1 <sup>1</sup> While there were twelve sandals total, ranging from size 10  
2 to 13, there were only five pairs; two sandals did not match.

1 the airport lobby to take possession of the drugs. Agent Garvey  
2 then asked Brutus if she would participate in a "controlled  
3 delivery" of the drugs. She agreed.

4 Once surveillance was in place, Brutus was instructed to  
5 walk into the airport lobby area and wait until she was  
6 approached by the pick-up person. Brutus did as she was  
7 instructed, but after a wait of 45 minutes, the agents abandoned  
8 the controlled delivery and brought Brutus back to the search  
9 room for further questioning.

10 Agents Garvey and Varian conducted the second interview,  
11 which lasted approximately 45 minutes to an hour, after reminding  
12 Brutus of her Miranda rights. She agreed to answer more  
13 questions and proceeded to provide additional details about her  
14 involvement in drug smuggling. She stated that she first met  
15 Marjorie while working with her at a Days Inn in Miami, Florida,  
16 and that she believed Marjorie now lived in New York or New  
17 Jersey. She further explained that she agreed to smuggle the  
18 drugs because she needed the money to pay her rent. Agents later  
19 found three notice slips in her suitcase indicating that \$190 in  
20 rent and \$65 in late payment penalties were overdue. The  
21 building address on the notices matched the address Brutus listed  
22 on her customs declaration form.

23 Brutus stated that she originally was supposed to fly into  
24 Miami but, on the day before her return trip, a male friend of

1 Marjorie's instructed Brutus to change her flight destination to  
2 New York. The same man gave Brutus the drugs at the airport in  
3 Haiti on the day she left for New York. Brutus also informed the  
4 agents that Marjorie had instructed her that, if no one met her  
5 in the airport lobby, she was to call Majorie in Haiti for  
6 alternative delivery instructions. She then provided the agents  
7 with the telephone number and expressed her willingness to  
8 participate in a recorded call with Marjorie. She noted,  
9 however, that Marjorie would expect her to speak in Creole.  
10 Without a Creole-speaking agent available to monitor the  
11 telephone call, the agents decided against placing the call.

12 During her second interview, Brutus also stated that she had  
13 smuggled drugs into Miami from Haiti in the fall of 2004. She  
14 said that that trip had been arranged by Marjorie and another  
15 woman named Mona. While she did not know what type of drugs she  
16 had smuggled during that trip, she knew they were concealed  
17 within wooden voodoo statues. She also explained how the  
18 delivery occurred: when she arrived in Miami, Mona's son Jason  
19 picked her up, took possession of the drugs, and two days later  
20 paid her \$2,500. Brutus' account of this event included physical  
21 descriptions of Marjorie, Mona, two male individuals associated  
22 with Marjorie, and Jason. Inspection of Brutus' passport  
23 revealed that she had flown to Haiti and returned to Miami  
24 several times in the fall of 2004.

1           **II. The Defense's Case**

2           Using a Haitian-Creole interpreter, Brutus took the stand in  
3 her own defense. She testified that much of what the  
4 government's witnesses said was accurate, including their account  
5 of the statements she made during her two airport interviews.  
6 She claimed, however, that certain statements – namely, her  
7 confession to the offenses of conviction and her admission to  
8 prior involvement in drug smuggling – were false.

9           According to Brutus, the agents initiated the first  
10 interview by asking her whether she knew her suitcase contained  
11 drugs. When she answered no, the agents asked her if she had  
12 children. She replied she had a two-month old baby and a five-  
13 year old. The agents responded, Brutus explained, by telling her  
14 that she would remain in prison for ten years if she refused to  
15 admit she knew of the drugs. Scared of this fate, Brutus told  
16 the jury, she falsely confessed.

17           Brutus also explained the statements she made during the  
18 second airport interview. She stated that one of the agents told  
19 her that he would help her plight if she said yes to the  
20 questions asked. She added that the agents were "so kind" to her  
21 when she admitted knowing about the drugs but were not kind when  
22 she denied it. This, according to Brutus, caused her to lie  
23 about the current smuggling trip and to falsely state that she  
24 had also smuggled drugs in the fall of 2004.

1           The truth, Brutus testified, was quite different. In  
2 contrast to the incriminating story she told during her two  
3 airport interviews, Brutus provided the following explanation for  
4 her trips to Haiti in the fall of 2004 and August 2005.

5           Brutus testified that she came to the United States from  
6 Haiti in 2000 and that, just prior to her arrest, she lived in  
7 Miami with her brother and two children. During 2004, she  
8 traveled to Haiti several times to visit her ailing father and,  
9 ultimately, to attend his funeral. It was during one of these  
10 trips, recounted Brutus, that "Mona," a friend of Brutus' mother,  
11 asked Brutus to bring certain traditional Haitian souvenirs to  
12 Miami and sell them in a store. Per Mona's instructions, Brutus  
13 was to send the proceeds to Mona in Haiti and tender any unsold  
14 items to Mona's son, Jason. Brutus testified that she complied  
15 with Mona's instructions but denied that the items Mona gave her  
16 contained drugs.

17           As to the trip to Haiti in August 2005 that resulted in her  
18 arrest, Brutus testified that its purpose was to see her ill  
19 mother outside of Port-au-Prince, Haiti. The day she arrived in  
20 Port-au-Prince, Brutus stayed in a hotel where Marjorie Luc, her  
21 best friend, came to see her. Brutus discussed her future plans  
22 with Marjorie, including her plan to move with her children to  
23 New York and find employment there. Brutus also told Marjorie  
24 that she had a good friend in New York, Alina, who had offered

1 her a place to stay and help finding a job. When Marjorie heard  
2 this, Brutus testified, Marjorie told Brutus not to fly back to  
3 Miami but, instead, to go directly to New York from Haiti.  
4 Marjorie then offered to pay for the ticket, adding that Brutus  
5 could take some sandals to a friend of Marjorie's in New York who  
6 often received sandals and similar items. Brutus asked Marjorie  
7 whether Brutus knew the friend, and Marjorie replied that she did  
8 but, wanting it to be a "surprise," would not tell Brutus the  
9 person's name. Brutus said she initially rejected Marjorie's  
10 proposal but, while visiting her mother the next day, gave it  
11 more thought and decided to accept.

12 Brutus testified that, as she had told Marjorie, she  
13 intended to stay with Alina while she took a few days to apply  
14 for jobs. She added that she planned to leave her older child  
15 with her brother and the younger with the child's father during  
16 this time. Brutus did not inform Alina of her plan. Nor did she  
17 tell her brother or the father of her youngest child, stating  
18 that the child's father would not have let Brutus travel to New  
19 York if she had told him beforehand. When asked why the father's  
20 permission would not be forthcoming, Brutus replied that she did  
21 not know.

22 Brutus then testified that when she returned to Port-au-  
23 Prince, she called Marjorie to accept her offer. The next day,  
24 Brutus went to the airport where she was met by an unknown man

1 and Marjorie, who handed Brutus an airplane ticket<sup>2</sup> and gave the  
2 suitcase full of sandals to security. Brutus stated that she had  
3 the opportunity to glance inside the suitcase when security  
4 opened it briefly, but she saw only sweatshirts. She then gave  
5 security a plastic bag full of her own clothes to place inside  
6 the suitcase and boarded the plane, never suspecting that  
7 Marjorie would have concealed drugs within the sandals.

### 8 **III. The Jury Charge**

9 Over the objection of defense counsel, the district court's  
10 jury charge included an interested-witness instruction,  
11 pertaining to Brutus' testimony, as follows:

12 The defendant is on trial only for the crimes charged  
13 in the indictment and for nothing else. And although  
14 presumed innocent and because she is presumed innocent,  
15 a defendant is not obligated to testify on her own  
16 behalf. She is not obligated to call any witnesses or  
17 present any evidence on her own behalf. But a  
18 defendant may testify on her [own] behalf and this  
19 defendant did so.

20  
21 A defendant who does testify on her own behalf  
22 obviously has a deep personal interest in the outcome  
23 of her prosecution. It's fair to say that the interest  
24 which a defendant has in the outcome of the case is an  
25 interest which is possessed by no other witness. And  
26 such an interest creates a motive to testify falsely.

27  
28 And in appraising the credibility of a defendant who  
29 testified on her own behalf, you may take that into  
30 consideration. However, and I want to say that with as  
31 much force as I can muster, it by no means follows  
32 simply because a person has a vital interest in the  
33 outcome of her trial that she is not capable of telling  
34 a truthful and straightforward story. The defendant's

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1 <sup>2</sup> The record reveals that this \$509.15 ticket was paid for in  
2 cash.

1 vital interest in the outcome of her case is not  
2 inconsistent with her ability to tell the truth. It's  
3 for you to decide what extent[,] if at all, her  
4 interest in the outcome of this trial has affected the  
5 color of her testimony.  
6

7 The jury returned guilty verdicts on the two counts brought  
8 against Brutus: importing five or more kilograms of cocaine, in  
9 violation of 21 U.S.C. § 952, and possessing five or more  
10 kilograms of cocaine with the intent to distribute, in violation  
11 of 21 U.S.C. § 841(a). The district court sentenced her  
12 principally to the mandatory minimum prison term of 120 months.  
13 This appeal followed.

## 14 DISCUSSION

### 15 I. The Challenged Instruction

16 Brutus argues that the district court committed reversible  
17 error in instructing the jury on how to evaluate her testimony  
18 because the instruction contains language that undermined the  
19 presumption of innocence owed to her as the accused. We  
20 generally review challenged jury instructions de novo, reversing  
21 only if the charge, taken as a whole, was prejudicial. See  
22 United States v. Bok, 156 F.3d 157, 160 (2d Cir. 1998).

23 Under our system of criminal justice, it is "axiomatic and  
24 elementary" that defendants are entitled to a presumption of  
25 innocence. Coffin v. United States, 156 U.S. 432, 453 (1895);  
26 see Estelle v. Williams, 425 U.S. 501, 503 (1976). "To implement  
27 the presumption," the Supreme Court has warned, "courts must be

1 alert to factors that may undermine the fairness of the  
2 fact-finding process." *Estelle*, 425 U.S. at 503. Our adherence  
3 to this admonishment has, on more than one occasion, required  
4 that we "place[] out of bounds practices that threaten to dilute  
5 the presumption of innocence." *United States v. Gaines*, 457 F.3d  
6 238, 245-46 (2d Cir. 2006); see, e.g., *United States v. Dove*, 916  
7 F.2d 41, 46 (2d Cir. 1990) (finding that a jury instruction's use  
8 of a hypothetical inquiry into "whether Jack shot Mary," which  
9 was intended to illustrate the concept of circumstantial  
10 evidence, was impermissible because it assumed Jack's guilt);  
11 *United States v. Oshatz*, 912 F.2d 534, 539 (2d Cir. 1990)  
12 (finding that while guilt-assuming hypothetical questions, posed  
13 on cross-examination to a defendant's character witnesses, have  
14 probative value in assessing the credibility of the witness, they  
15 are "prohibited because [they] create[] too great a risk of  
16 impairing the presumption of innocence").

17 Principally relying on *Gaines*, in which we discussed the  
18 presumption of innocence in the interested-witness instruction  
19 context, Brutus argues that reversible error lies in the district  
20 court's instruction that Brutus had a "deep personal interest in  
21 [the case] . . . possessed by no other witness . . ., [which]  
22 create[d] a motive to testify falsely." The government counters  
23 that reversal is precluded by *United States v. Tolkow*, 532 F.2d  
24 853 (2d Cir. 1976), which found language nearly identical to that

1 challenged by Brutus to be unobjectionable. The government adds  
2 that any untoward effect of the challenged language was  
3 adequately "balanced" by other, more favorable language.

4 There is tension between Tolkow and Gaines. In Gaines, we  
5 reviewed an interested-witness instruction relating to the  
6 defendant's testimony that stated:

7 Obviously, the defendant has a deep personal interest  
8 in the result of his prosecution. This interest  
9 creates a motive for false testimony and, therefore,  
10 the defendants' testimony should be scrutinized and  
11 weighed with care.

12 Gaines, 457 F.3d at 242.

13 We criticized several aspects of this instruction. First,  
14 we said that "an instruction that the defendant has a motive to  
15 testify falsely undermines the presumption of innocence," id. at  
16 246, because it impermissibly presupposes the defendant's guilt,  
17 id. at 247 ("The critical defect in a jury instruction that says  
18 the defendant has a motive to lie is its assumption that the  
19 defendant is guilty."). In order to "prevent [this] needless  
20 threat of dilution of the presumption of innocence, we . . .  
21 direct[ed] district courts in the circuit not to charge juries  
22 that a testifying defendant's interest in the outcome of the case  
23 creates a motive to testify falsely." Id.<sup>3</sup>

24 Next, we were concerned about the instruction's statements

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1 <sup>3</sup> This opinion resolves the tension between United States v.  
2 Tolkow, 532 F.2d 853 (2d Cir. 1976), and United States v. Gaines,  
3 457 F.3d 238 (2d Cir. 2006), the latter case having been decided  
4 after the instruction at issue in this case was delivered.

1 that the defendant had a "deep personal interest" in the outcome  
2 of the trial and that his testimony should "therefore . . . be  
3 scrutinized and weighed with care." Id. (alteration in  
4 original). We thought that such statements may, by themselves,  
5 sufficiently dilute the presumption of innocence to constitute  
6 reversible error. We did not go that far, however, and held that  
7 these statements simply added to the error already identified in  
8 the "motive to lie" instruction. Id. Nonetheless, we  
9 disapproved of jury instructions that "highlight[] a testifying  
10 defendant's deep personal interest in the outcome of a trial,"  
11 id., and urged district courts to refrain from using them, see  
12 id. at 249. We concluded in Gaines "that the charge viewed as a  
13 whole was so unbalanced as to amount to reversible error." Id.  
14 at 250.

15 In Tolkow, by contrast, we upheld an interested-witness  
16 instruction regarding the defendant's testimony that stated:

17 Obviously [the defendant] has a deep, personal interest  
18 in the result of his prosecution. Indeed, it is fair  
19 to say he has the greatest stake in its outcome.  
20 Interest creates a motive for false testimony; the  
21 greater the interest the stronger the motive, and a  
22 defendant's interest in the result of his trial is of a  
23 character possessed by no other witness.

24  
25 532 F.2d at 859 n.3. (internal formatting omitted).

26 Recognizing the inconsistency between our ruling in Gaines  
27 and our many decisions upholding interested-witness instructions  
28 similar to that given in Tolkow, we explained in Gaines that:

1 "This case involves (1) a preserved challenge to a charge that  
2 (2) the defendant has a deep personal interest giving rise to (3)  
3 a motive to lie and a resulting need to (4) carefully scrutinize  
4 the defendant's testimony." 457 F.3d at 250 n.10. We then  
5 distinguished the many previously approved interested-witness  
6 instructions on the basis that they lacked one of these factors<sup>4</sup>  
7 – specifically distinguishing Tolkow on the basis that the  
8 instruction therein did not tell the jury to "carefully  
9 scrutinize the defendant's testimony." Id.

10 The instruction here is, as the government contends,  
11 materially indistinguishable from the one given in Tolkow. Both  
12 instructions contain statements about the defendant's deep  
13 personal interest in the outcome of the case, which is held by no  
14 other, and that such an interest creates a motive to testify  
15 falsely; but the instructions, both in Tolkow and this case, lack  
16 a "careful scrutiny" instruction. Hence, were we to adhere to  
17 Tolkow, the government would prevail on this issue.

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1 <sup>4</sup> See United States v. Gleason, 616 F.2d 2, 15 (2d Cir. 1979)  
2 (instruction that interest "creates, at least potentially, a  
3 motive for false testimony" does not assume guilt) (internal  
4 quotation marks omitted); United States v. Vega, 589 F.2d 1147,  
5 1154 (2d Cir. 1978) (no objection); United States v. Hernandez,  
6 588 F.2d 346, 349-50 (2d Cir. 1978) (no objection); United States  
7 v. Rucker, 586 F.2d 899, 904 (2d Cir. 1978) (no objection);  
8 United States v. Floyd, 555 F.2d 45, 47 (2d Cir. 1977) (no  
9 careful scrutiny instruction); United States v. Martin, 525 F.2d  
10 703, 706 (2d Cir. 1975) (no objection; no careful scrutiny  
11 instruction); United States v. Mahler, 363 F.2d 673, 678 (2d Cir.  
12 1966) (no objection; no motive to lie instruction).  
13

1           The principle underlying Gaines, however, leads us to now  
2 reject the instruction we once approved in Tolkow and to overrule  
3 that holding.<sup>5</sup> Simply stated, an instruction that the  
4 defendant's interest in the outcome of the case creates a motive  
5 to testify falsely impermissibly undermines the presumption of  
6 innocence because it presupposes the defendant's guilt. Gaines,  
7 457 F.3d at 246-47. This is no less true where, as here, the  
8 instruction omits additional language specifically cautioning the  
9 jury to carefully scrutinize and weigh the defendant's testimony.

10           We also cannot accept the government's contention that the  
11 instruction's prejudicial language was "balanced" by other, more  
12 favorable language. We made clear in Gaines that the defect in  
13 an instruction that assumes the defendant's guilt "is not cured  
14 by a further charge that a defendant can still be truthful." Id.  
15 at 247. Accordingly, with Gaines we established a prophylactic  
16 rule that it is error to instruct the jury that a defendant's  
17 interest in the outcome of the case creates a motive to testify  
18 falsely; it follows that the charge at issue here was error, the

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1           <sup>5</sup> We also abandon our holding in Floyd to the extent that it  
2 is inconsistent with this opinion. See 555 F.2d at 47  
3 (distinguished in Gaines as having no careful scrutiny  
4 instruction). We recognize that the law of the circuit doctrine  
5 dictates that we are "bound by the decisions of prior panels  
6 until such time as they are overruled either by an en banc panel  
7 of our Court or by the Supreme Court." United States v.  
8 Wilkerson, 361 F.3d 717, 732 (2d Cir. 2004). We have therefore  
9 circulated this opinion to all active members of this court  
10 before filing. See, e.g., United States v. Gonzalez, 420 F.3d  
11 111, 132 n.18 (2d Cir. 2005); United States v. Mincey, 380 F.3d  
12 102, 103 n.1 (2d Cir. 2004) (per curiam).

1 prejudice from which was exacerbated by the district court's  
2 reference to the defendant's "deep personal interest." See id.

3 We caution our district courts that if the defendant has  
4 testified, the charge should tell the jury to evaluate the  
5 defendant's testimony in the same way it judges the testimony of  
6 other witnesses. See id. at 249. As we did in Gaines, we refer  
7 district courts to the Seventh Circuit's pattern instruction.<sup>6</sup>

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1 <sup>6</sup> **1.03 TESTIMONY OF WITNESSES (DECIDING WHAT TO BELIEVE)**

2  
3 You are to decide whether the testimony of each of the  
4 witnesses is truthful and accurate, in part, in whole, or  
5 not at all, as well as what weight, if any, you give to the  
6 testimony of each witness.

7  
8 In evaluating the testimony of any witness, you may  
9 consider, among other things:

10 . . .

- 11 - the witness's intelligence;
- 12
- 13 - the ability and opportunity the witness had to  
14 see, hear, or know the things that the witness  
15 testified about;
- 16
- 17 - the witness's memory;
- 18
- 19 - any interest, bias, or prejudice the witness may  
20 have;
- 21
- 22 - the manner of the witness while testifying; and
- 23
- 24 - the reasonableness of the witness's testimony in  
25 light of all the evidence in the case.
- 26
- 27
- 28

29 [You should judge the defendant's testimony in the same  
30 way that you judge the testimony of any other witness.]

31  
32 Gaines, 457 F.3d at 249 n.8 (alteration in original); see also  
33 Pattern Criminal Federal Jury Instructions for the Seventh  
34 Circuit 4 (1998), available at

1 Moreover, if the district court wishes to use additional charging  
2 language, we see no problem with the one given in Gaines,  
3 stripped of its prejudicial language, id. at 249 & n.9.<sup>7</sup>

## 4 **II. Harmless Error**

5 The government argues that the foregoing error was harmless.

6 Brutus counters that the instruction was "harmful because it  
7 put [her] at a clear disadvantage with respect to the conflicts  
8 between her testimony and that of the government's witnesses."  
9 "The crucial point in this regard," Brutus maintains, "was the  
10 contrast between [her] testimony that she had been told she could  
11 receive a ten-year sentence and be taken away from her children,  
12 which caused her to falsely confess in order to cooperate and  
13 obtain a lower sentence, and the agent's testimony that he raised  
14 these matters only after [she] confessed."

15 Because the district court's error affected the presumption

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1 <http://www.ca7.uscourts.gov/pjury.pdf>.

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<sup>7</sup> This charge would read:

The defendant in a criminal case never has any duty to  
testify or come forward with any evidence. This is because,  
as I have told you, the burden of proof beyond a reasonable  
doubt remains on the government at all times, and [the  
defendant] is presumed innocent. In this case, [the  
defendant] did testify and he was subject to  
cross-examination like any other witness. You should  
examine and evaluate the testimony just as you would the  
testimony of any witness with an interest in the outcome of  
the case.

Gaines, 457 F.3d at 249 n.9 (alterations in original).

1 of innocence, and was therefore constitutional error, see  
2 Estelle, 425 U.S. at 503 (“The presumption of innocence, although  
3 not articulated in the Constitution, is a basic component of a  
4 fair trial under our system of criminal justice.”); Gaines, 457  
5 F.3d at 245, the standard for harmlessness is the familiar one  
6 established by Chapman v. California, 386 U.S. 18 (1967):  
7 “[B]efore a federal constitutional error can be held harmless,  
8 the court must be able to declare a belief that it was harmless  
9 beyond a reasonable doubt.” Id. at 24. This requires a negative  
10 answer to “whether there is a reasonable possibility that the  
11 [error] complained of might have contributed to the conviction.”  
12 Id. (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)).  
13 Where, as here, the error was preserved, the burden of  
14 establishing harmlessness is on the government. United States v.  
15 Olano, 507 U.S. 725, 734 (1993); United States v. Quattrone, 441  
16 F.3d 153, 181 (2d Cir. 2006).

17 Based on the evidence presented at trial, it is plain that  
18 under the Chapman standard the error in the instruction did not  
19 contribute to Brutus’ convictions. This was not a close case.  
20 Even assuming that the jury would have credited Brutus’ testimony  
21 that the agents informed her of the possible time she faced  
22 before she gave her confession, we are confident that the jury  
23 would have rejected the balance of her trial testimony in favor  
24 of the version in her confession. Not only was the veracity of

1 her confession inherently plausible, her contrary story at trial  
2 was manifestly incredible, prompting the experienced Judge  
3 Glasser to note at sentencing that it was "the most incredible  
4 perjury I've ever heard in any case I've ever tried in this  
5 court."

6 During Brutus' initial airport interview, she gave a  
7 particularized account of her involvement in smuggling the seized  
8 cocaine. The details for her confession were not the product of  
9 leading questions. To the contrary, Brutus volunteered to the  
10 agents extensive information on who recruited her for the trip;  
11 how much she was paid; and how she was to effect delivery of the  
12 drugs in the United States. After the attempted controlled  
13 delivery of the drugs failed, Brutus then told the agents her  
14 back-up plan and provided them with her recruiter's telephone  
15 number. Her second airport interview was even more extensive.  
16 She told the agents how she met her recruiter; how a man told her  
17 to change her flight destination from Miami to New York; and how  
18 that man gave her the drugs on the morning of her flight to New  
19 York. She further explained that she agreed to smuggle the drugs  
20 because she needed money to pay her rent, which was corroborated  
21 by rent notice slips found in her suitcase.

22 Brutus also volunteered her involvement in a prior drug  
23 smuggling venture. She told the agents who arranged the trip;  
24 how the drugs were concealed (in wooden voodoo statues); to whom

1 she delivered the drugs; and how much she was paid for her  
2 efforts. She also provided detailed descriptions of all the  
3 participants. In sum, the exhaustive detail of the defendant's  
4 confessions as to the offenses of conviction and her prior drug  
5 smuggling trip belies her contention that she made up these  
6 stories to cooperate with authorities.

7 On the other hand, Brutus' trial testimony of the events  
8 leading up to her August 2005 arrival at JFK airport made  
9 virtually no sense. She testified that she planned to stay with  
10 Alina while applying for jobs, but she admitted that she had  
11 never informed Alina that she would be arriving in August after  
12 testifying that she had told Alina she would be coming in  
13 September. She denied that she ever informed her family of her  
14 plans, but when asked why, her excuse was that the father of her  
15 youngest child would not have given his permission. Yet she was  
16 at a loss to explain why the father's permission was necessary or  
17 why it would not be forthcoming.

18 Lastly, the jury heard an absurd story regarding the  
19 financing of Brutus' airfare from Haiti to New York and from New  
20 York to Miami. Brutus implausibly claimed that Marjorie paid for  
21 the \$509.15 ticket from Haiti to New York because she wanted  
22 Brutus to deliver sandals to a friend. As for the return trip to  
23 Miami, Brutus' story was that she expected Alina to pay for the  
24 flight.

1 Faced with what Judge Glasser termed "the most incredible  
2 perjury," it is plain to us that an appropriate jury instruction  
3 on assessing the defendant's testimony would have yielded exactly  
4 the same result and that the error was therefore harmless beyond  
5 a reasonable doubt.

6 **CONCLUSION**

7 For the foregoing reasons, we AFFIRM the district court's  
8 judgment of conviction.